Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

SIPCO, INC. and MONFORT, INC.,

Petitioners,

v.

FRED G. JENSEN, JAMES J. MONAHAN, WALTER C. CLARK, and RICHARD F. KRIEGLER, on behalf of themselves and others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If official plan documents reserve an employer's right to change or terminate salaried retiree medical benefits, should the employer be forced to provide unchanged benefits for life, based on promises and representations of policy?

RULE 29.1 LISTING

When suit was initiated in July 1989, the parent company of Petitioner SIPCO, Inc. was ConAgra, Inc. In July 1989 SIPCO, Inc. had no subsidiaries other than wholly owned subsidiaries. SIPCO, Inc. is no longer doing business.

The parent company of Petitioner Monfort, Inc. is ConAgra, Inc. Monfort, Inc. has no subsidiaries other than wholly owned subsidiaries.

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FRED G. JENSEN, JAMES J. MONAHAN, WALTER C. CLARK, and RICHARD F. KRIEGLER, on behalf of themselves and others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners SIPCO, Inc. and Monfort, Inc. respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on October 13, 1994.

OPINIONS BELOW

The opinion of the court of appeals is reported at 38 F.3d 945 (8th Cir. 1994), and is reproduced in the Appendix to this Petition at App. 1-17.

The opinion of the district court is reported at 867 F.Supp. 1384 (N.D.Iowa 1993), and is reproduced in the Appendix to this Petition at App. 18-49.

JURISDICTION

The court of appeals entered judgment on October 13, 1994. Petitioners' motion for rehearing and suggestion for rehearing en banc were denied on November 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved is the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001 *et seq.* (ERISA), and in particular the following provisions:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program . . . established or maintained by an employer or by an employee organization . . . for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment
>
> * * *
>
> 29 U.S.C. §1002(1)

This part [ERISA, Title I, Part 2, Participation and Vesting] shall apply to any employee benefit plan . . . other than –

(1) an employee welfare benefit plan

* * *

29 U.S.C. §1051(1)

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . .

* * *

29 U.S.C. §1053(a)

(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument.

* * *

29 U.S.C. §1102(a)(1)

(b) Every employee benefit plan shall –

(3) provide a procedure for amending such plan. . . .

29 U.S.C. §1102(b)(3)

STATEMENT OF THE CASE

In July 1989, Respondents, four salaried retirees, filed an ERISA class action against their former employer, Petitioner SIPCO Inc. (SIPCO), and its sister company,

Petitioner Monfort, Inc. (Monfort), which administered SIPCO retiree medical plans. The retirees sued on behalf of a class of 800 SIPCO salaried retirees and dependents, seeking to prohibit SIPCO and Monfort from changing or terminating medical benefits during class members' lifetimes.

The impetus for the class action was Petitioners' insertion of reservation of rights language into summary plan descriptions (SPDs) for SIPCO retiree medical plans. Unlike the SPDs, the formal or official documents for the retiree medical plans and for the trust funding the plans had at all times contained language reserving the employer's right to amend or terminate benefits.

Reservation of rights provisions in the plan and trust documents read as follows:

> **ARTICLE XVI**
>
> **Power of Amendment**
>
> 1. The Board of Directors of the Company shall have the right and power to alter, amend, or annul any of the provisions of this pensioner medical plan. . . .
>
> * * *
>
> **ARTICLE XII**
>
> **Power of Amendment**
>
> 1. The pension board of the Company shall have the right and power to alter, amend, or annul any of the provisions of this medical plan for salaried pensioners. . . .
>
> * * *

ARTICLE IX-1

Amendment

This trust agreement may be amended from time to time by the corporation. . . .

* * *

The SPDs for the retiree medical plans were silent on two issues. First, they did not mention SIPCO's reserved rights to amend or terminate retiree medical benefits. Second, the SPDs did not promise the retirees lifetime benefits.

In addition to reservation of rights language in the plan and trust documents, the record contains evidence extrinsic to the plans, which is largely undisputed. The evidence includes the following:

- testimony by a former SIPCO benefits manager about SIPCO's policy of providing lifetime retiree medical benefits; as well as her letters to the IRS and to a former SIPCO vice president concerning the possibility of terminating retiree medical plans

- testimony by a former SIPCO president and CEO, John Copeland (the credibility of whose testimony about SIPCO has been placed in doubt recently in *Esmark, Inc. and United Food and Commercial Workers Int'l Union*, 315 NLRB No. 108 (1994)), concerning SIPCO's intent to continue Swift's policy of "vesting" medical benefits

- a prospectus and merger agreement entered into when SIPCO was sold in 1986, providing

that retiree medical plans were to be maintained for three years; as well as testimony by the purchaser's negotiator to that effect

- an outside actuary's concern that Petitioners would have difficulty in reducing retiree benefits because of SPD language

- testimony by class members about promises of lifetime medical benefits made to them at their retirements, or decades earlier at employment interviews by SIPCO's predecessors

- prior changes to a retiree medical plan, implemented without objection

None of the oral or written extrinsic evidence listed above was incorporated into the plan documents. The documents did, however, include reservation of rights language.

Following a December 1991 trial, the district court entered findings of fact and conclusions of law and an order on August 6, 1993. Final judgment was entered August 13, 1993.

The court held that omitting reservation of rights language from the SPDs violated ERISA by being both a material misrepresentation and a breach of fiduciary duty. Concluding also that the retiree class had relied on the silent SPDs, the court held Petitioners equitably estopped from using their reserved rights, prohibited them from changing retiree medical benefits, and ordered them to provide the class with unchanged medical benefits for life.

The judgment was appealed to the Eighth Circuit Court of Appeals on September 2, 1993. On October 13, 1994, the court of appeals issued an opinion and judgment in favor of the retiree class. Petitioners' motion for rehearing and suggestion for rehearing en banc were denied on November 18, 1994.

Although ultimately affirming the district court's judgment, the Eighth Circuit opinion disagreed specifically with most of its holdings. First, expressly opposing the district court's fundamental holding, the appellate court concluded that ERISA does not require SPDs for welfare plans to disclose that welfare benefits are not vested benefits. Following from its initial conclusion – and again contrary to the lower court's holding – the Eighth Circuit held that Petitioners' failure to disclose in the SPDs their reserved rights to amend or terminate benefits was neither a material misrepresentation nor a breach of fiduciary duty. The appellate court also held that the silent SPDs did not equitably estop Petitioners from relying on their reserved rights (assuming without deciding the propriety of applying estoppel under ERISA). The Eighth Circuit concluded additionally that an employer's affirmative promise to provide vested welfare benefits must be incorporated into the formal written ERISA plan documents (which would include the SPDs).

The Eighth Circuit affirmed the lower court's judgment by relying on some of the extrinsic evidence – mainly oral – outlined above. None of the extrinsic evidence supporting the court's conclusion was incorporated into the formal plan documents or into the SPDs.

Despite the fact that the plan documents contained no promises of vested benefits, the court concluded that SIPCO intended for medical benefits to vest at retirement. It employed two separate rationales to do so.

First, the court found that reservation of rights language in the plan documents was "not facially unambiguous," or "not free of ambiguity." The court failed to explain or support its nebulous holding, merely concluding either that changes in medical benefits were intended to be prospective only, or that SIPCO had relinquished its power to modify benefits for retirees. Second, the Eighth Circuit gave weight to oral testimony on the following subjects: promises of lifetime benefits; the intent of SIPCO's predecessor (Swift) to vest salaried retiree medical benefits; and SIPCO's intent to continue that practice. However, the court gave no weight to the following documentary evidence, which it had not found ambiguous: a prospectus and merger agreement establishing SIPCO's purchaser's right to terminate retiree medical benefits after three years; written intra-company communications concerning the possibility of retiree medical benefit plan termination; and a written communication with the IRS concerning the same possibility.

REASONS FOR GRANTING REVIEW

I. Introduction

The Supreme Court should grant review of the Eighth Circuit's decision for three reasons. First, finding an intent to vest welfare benefits in disregard of a reserved rights provision creates an intolerable conflict

with other circuit decisions indistinguishable from this one. Second, allowing this decision to stand violates ERISA's statutory prohibitions against permitting informal amendments to employee benefit plans and against vesting welfare benefits. Third, this case presents a companion issue to that presented by *Schoonejongen v. Curtiss-Wright Corp.*, which is presently pending before the Supreme Court.

II. The Eighth Circuit's Determination that Benefits are Vested Here Conflicts with Decisions Relying on Employers' Reserved Rights to Amend or Terminate Benefits

The present case is no different from all others in which salaried retirees have been denied unchanged medical benefits for life. However, the holding of *Jensen v. SIPCO* – that salaried retiree medical benefits are vested – is in direct conflict with a body of settled authority.

Appellate courts throughout the circuits (including the Eighth Circuit here) hold that retiree medical benefits, which are ERISA welfare benefits, are not vested. *See* 29 U.S.C. §§1002(1), 1051(1) and 1053(a). Since welfare benefits do not automatically vest, they may be changed or terminated if an employer has reserved its right to do so. Accordingly, the issue of the significance of reservation of rights provisions arises in cases dealing with welfare benefits.

Because welfare benefits do not vest, appellate courts draw the conclusion that language in formal plan documents reserving an employer's right to change or discontinue such benefits is paramount. Therefore, a reservation

of rights provision will override written and oral communications and representations to the contrary. *See, e.g., Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855-56 (4th Cir. 1994); *Alday v. Container Corp. of Am.*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675 (1991); *Musto v. American Gen. Corp.*, 861 F.2d 897, 907 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 491 (2d Cir. 1988).

The following reservation of rights provisions are typical of those having been held sufficient to uphold an employer's right to terminate or modify retiree medical benefits:

- This Policy may be amended or discontinued at any time . . . without the consent of or notice to any [plan participant].

Gable v. Sweetheart Cup Co., Inc., 35 F.3d at 856.

- The Company reserves the right to alter, amend, delete, cancel or otherwise change the Plan or any of the provisions of the Plan at anytime [sic].

Wise v. El Paso Natural Gas Co., 986 F.2d 929, 933 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 196 (1993).

- [Plan administrators reserved the right to] terminate, suspend, withdraw, amend or modify the Plan in whole or part at any time.

Alday v. Container Corp. of Am., 906 F.2d at 662.

- The Group Policy, or any insurance coverage thereunder, may be amended or discontinued at any time.

- The Company fully intends to continue the Plan indefinitely and to meet any foreseeable situations that may occur. However, the Company does, as it always has, reserve the right to change the Plan and, if necessary, discontinue it.

Musto v. American Gen. Corp., 861 F.2d at 903-04.

- The Company reserves the right at any time to change or discontinue this Supplementary Medical Expense Plan.

Moore v. Metropolitan Life Ins. Co., 856 F.2d at 490.

No appellate court has held the language quoted above ambiguous. However, the Eighth Circuit held the language of Petitioners' reserved rights provisions, which are substantially identical to the quoted provisions, "not facially unambiguous," or "not free of ambiguity." *See* above at 4-5.

In addition to its similar reserved rights provisions, this case is typical of the other salaried retiree medical benefit cases Petitioners cite; nothing evidentiary distinguishes it. However, in many respects *Jensen v. SIPCO* appears closest to *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, in which the Supreme Court denied certiorari in October 1993. *See* ___ U.S. ___, 114 S.Ct. 196 (1993).

To Petitioners' knowledge *El Paso Natural Gas Co.* is the first opinion considering the legal significance of silent SPDs. The case is also analogous to the present case because of the identical circumstances leading to litigation, *i.e.*, a purchaser's issuance of SPDs containing reserved rights language for the first time. The *El Paso*

Natural Gas Co. record even contains evidence of an actuary's concern for possible problems with prior silent SPDs – evidence discounted as legally irrelevant by the Fifth Circuit yet given weight by the Eighth Circuit. *Id.* at 933.

The Fifth Circuit denied the retirees' claim for lifetime benefits in *El Paso Natural Gas Co.* In so doing, the court stressed that any participant's right to a fixed level of benefits must be "found in the plan documents and must be stated in clear and express language." *Id.* at 937. Because nothing in the plan documents granted the retirees that right, the Fifth Circuit held they were not entitled to lifetime medical benefits. Although the plan documents in the present case also do not contain language granting the *Jensen* retirees a fixed level of benefits, the Eighth Circuit held nonetheless that they were entitled to lifetime medical benefits.

Jensen v. SIPCO is not similar only to *El Paso Natural Gas Co.*; it is virtually indistinguishable from other retiree medical benefit cases, all of which deny salaried retirees' claims. For example, *Alday v. Container Corp. of Am.*, 906 F.2d 660, concerns a salaried retiree class seeking unchanged medical benefits for life. As in *Jensen v. SIPCO*, the plan documents reserved the employer's right to amend or terminate. The record also contained various written communications not mentioning the employer's reserved rights. *Id.* at 665.

The Eleventh Circuit declined to consider the informal letters and booklets. Holding that the rights reserved to the employer in the plan documents must control, the

court affirmed summary judgment for Container Corp. of America. *Id.* at 666.

A salaried retiree class is involved too in *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488. The record in *Metropolitan Life Ins. Co.* contains some representations of lifetime benefits made to the retiree class. Mirroring the present case, the record also contains evidence that the plans had been changed previously without protest. *Id.* at 490.

As did all other circuits – except the Eighth Circuit here – the Second Circuit gave no weight to the promises of lifetime benefits. It concluded instead that the specific language of the plan documents governed. Therefore, the court denied the retirees their request for lifetime benefits, holding that reserved rights in the plan documents would supersede any communications describing the plan as providing lifetime benefits at no cost.

Salaried retirees also brought a class action in *Musto v. American Gen. Corp.*, 861 F.2d 897. Once again, the record contains language reserving the employer's right to modify or terminate retiree benefits, as well as "unofficial" documents that the retirees claimed promised them free medical insurance for life. *Id.* at 902-05, 907. As does the record in this case, the record includes testimony from a retired vice-president about lifetime benefits. *Id.* at 909 n.8. The Sixth Circuit held that the written plan document, which included the employer's reserved rights, controlled over any other communications. *Id.* at 910. Accordingly, lifetime medical benefits were denied.

The recent case of *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, applies the same reasoning to similar facts. The

Fourth Circuit affirmed summary judgment for Sweetheart Cup, allowing it to decrease retirees' medical benefits. Based mainly on an express reservation of rights found in the plan documents, the appellate court discounted the retirees' claim that their benefits had vested at retirement. The court also refused to give weight to informal communications ("Schedule II documents") promising lifetime benefits. *Id.* at 857. It disagreed as well with the retirees' argument – one advanced in the present case and accepted without explanation as the Eighth Circuit's conclusion – that any changes were for active employees only. *Id.* at 856-57.

That this is not a unique or fact-bound case is obvious. It is simply a factual amalgam of other salaried retiree medical benefit cases in the Second, Fourth, Fifth, Sixth and Eleventh Circuits. Its record contains similarities to evidence discussed in the other opinions, including the following: similar language in the plan documents reserving an employer's rights to amend or terminate (found "not facially unambiguous" only in this case); subsequent purchase of a company; promises of lifetime benefits made to retirees decades earlier; actuarial concerns; prior plan changes implemented without objection; and executives' representations of lifetime benefits.

The present case differs only in its reasoning and disposition, both of which are in intolerable conflict with those of the Fifth Circuit in *Wise v. El Paso Natural Gas Co.*, and with those of the other appellate courts cited. The Supreme Court should grant certiorari to resolve the conflict.

III. The Negative Consequences of this Decision Are Far Reaching

The Eighth Circuit issued more than an aberrant opinion declining to follow settled authority when it decided *Jensen v. SIPCO*. Because of the nature and result of the decision, this case will not disappear or self-correct. To the contrary, as it is written the opinion provides unintended avenues for informally amending plan documents and for vesting welfare benefits.

Allowing the decision to become precedent has both legal and economic consequences. The obvious consequence is the litigation that will ensue because of the opinion: *Jensen v. SIPCO* has opened the door to those attempting to obtain retiree medical benefits in spite of employers' reserved rights. More broadly, however, the law concerning salaried retiree medical benefits – and perhaps welfare benefits in general – will move in an improper direction.

By being able to be circumvented, ERISA's statutory scheme will be adversely affected. 29 U.S.C. §1102(a)(1) mandates that all employee benefit plans be "established and maintained pursuant to a written instrument." The written instrument must describe formal plan amendment procedures to be followed. 29 U.S.C. §1102(b)(3). Therefore, appellate courts agree (mainly through rejecting estoppel arguments) that informal oral or written representations or communications are legally insufficient to amend an employee benefit plan. *See, e.g., Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1051 (1993); *Rodrigue v. Western and S. Life Ins. Co.*, 948 F.2d 969 (5th Cir. 1991);

Cefalu v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989); *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1586 (1993); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986).

Should the reasoning in this case be used as future authority, employee benefit plans will be able to be amended easily: not, as ERISA requires, through formal amendment procedures and written amendments incorporated into the official plan document, but rather by informal communications and representations outside the plan. The plan amendments permitted by the Eighth Circuit in *Jensen v. SIPCO* violate ERISA.

Furthermore, ERISA has specifically excepted welfare benefits from statutory vesting. *See* 29 U.S.C. §§1002(1), 1051(1), and 1053(a). If certiorari is denied in this case, future courts may hold welfare benefits vested merely on self-serving representations of policy and oral promises, neither of which need be included in the plan documents.

Second, the Supreme Court should consider the economic consequences on employers throughout the United States if the Eighth Circuit opinion becomes law. Employers' liability for post-retirement medical benefits is staggering at present. Although the value of retiree medical benefits in American private industry is impossible to measure accurately, earlier liability estimates have ranged from nearly $100,000,000,000 to five times that amount. Moreover, because of rapidly increasing medical costs, longer life spans, more sophisticated forms of treatment, and greater utilization of medical services, employers' liability continues to expand. *See* Paul J. Routh and Ronald A. Kladder, *Welfare Benefits Guide 1994*

§§7.01, 7.02 (1991-93) (citing in part 15 Pens. Rep. (BNA) 378 (1988); 15 Pens. Rep. (BNA) 676 (1988)).

An estimate of Petitioners' liability for a class of 800 retirees and dependents is necessarily imprecise. However, the trust established for retiree medical benefits, which at trial was found to be worth up to $8,000,000, is far from the amount needed to provide medical benefits for class members.

Furthermore, Petitioners are in the position of being forced to provide lifetime medical benefits for a group of individuals, many of whom have spent much of their working lives employed not by SIPCO or Monfort but by predecessor companies. Petitioners' position is far from unique, however. It is not uncommon for employers, as subsequent purchasers of companies, to have inherited retiree workforces and welfare benefit plans in which retirees are participants. Successor employers should not be bound by representations of policy and promises made decades earlier, often by predecessor employers once or twice removed.

Faced with daunting health care liability, employers must be allowed to rely on the rights reserved to them in formal welfare plan documents. ERISA entitles them to modify or terminate welfare benefits. As the Fifth Circuit has explained, employers should be permitted to do so:

> Across the nation, companies faced with rapidly rising costs and worried about their competitiveness are paring retiree benefits that were once considered sacrosanct. But ERISA simply does not grant employees unfettered rights to the corporate treasury. Employers need not

> abandon prudent business behavior when marketplace forces compel them to rethink earlier offers of contingent, non-vested benefits. In light of today's spiraling health care costs, cutbacks in government-sponsored health care coverage (Medicare), and our ever-aging population, Congress may enact changes. But the current ERISA requires no more.

See Wise v. El Paso Natural Gas Co., 986 F.2d at 937.

As equitable as the decision in *Jensen v. SIPCO* may have been for the retirees, ERISA does not grant the Eighth Circuit the right to have made it. The Supreme Court should grant certiorari to prevent the error from spreading.

IV. *Jensen v. SIPCO* Is the Converse of *Schoonejongen v. Curtiss-Wright Corp.*

The Supreme Court granted certiorari and on January 17, 1995 heard oral argument in *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), *cert. granted*, 115 S.Ct. 42 (Sept. 26, 1994) (No. 93-1935). *Curtiss-Wright* concerns a Third Circuit decision that barred an employer from terminating retiree health benefits because the plan lacked a detailed amendment procedure. The plan did, however, contain a reservation of rights clause.

The Supreme Court in future will address the type of specificity required in a welfare plan's amendment procedure when the plan contains an adequate reservation of rights provision. As far as Petitioners are aware, the Court has not addressed the converse issue: given a welfare plan's adequate amendment procedure, under what

circumstances – if any – may a reservation of rights provision be overridden to effectively amend the plan? The Supreme Court should do so by granting certiorari in this case.

CONCLUSION

For all reasons stated in this petition, Petitioners respectfully request that a writ of certiorari issue in this case to review the decision and order of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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